7 FAM 1270
MILITARY SERVICE AND LOSS OF NATIONALITY

(CT:CON-407; 06-29-2012)
(Office of Origin: CA/OCS/L)

7 FAM 1271 INTRODUCTION

(CT:CON-285; 03-06-2009)

a. 7 FAM 1222, paragraph a, explains that in light of the U.S. Supreme Court decisions in Vance v. Terrazas (1980) and Afroyim v. Rusk (1967) the Department of State adopted the administrative presumption found in 22 CFR 50.40 that a U.S. citizen/noncitizen national intends to retain U.S. nationality when he or she commits certain expatriating acts. That administrative presumption is in the process of being revised in 22 CFR Part 50, and includes when a U.S. citizen serves as a commissioned or noncommissioned officer of a foreign state, not engaged in hostilities against the United States (INA 349(a)(3), 8 U.S.C. 1481(a)(3)).

b. INA 349(a)(3) does not require that the person possess the nationality of the foreign state into whose armed services he or she has entered or served.

c. If a U.S. citizen serves as a commissioned or noncommissioned officer of a foreign state, not engaged in hostilities against the United States, with the intention of relinquishing U.S. citizenship, he or she may execute Form DS-4079, Questionnaire: Information for Determining Possible Loss of U.S. Citizenship, and the consular officer may proceed to develop the loss-of-nationality case in accordance with 7 FAM 1220.

d. If a U.S. citizen serves in the armed forces of a foreign state or as a commissioned or noncommissioned officer of a foreign state engaged in hostilities against the United States the administrative presumption of intention to retain U.S. citizenship does not apply, and the consular officer should develop the loss-of-nationality case in accordance with guidance provided in 7 FAM 1274. 7 FAM 1275, paragraph c, provides guidance about U.S. citizens serving in paramilitary organizations abroad, engaged in hostilities against the United States as opposed to service in the armed forces of foreign nation-states.

e. Child soldiers: While INA 349(a)(3) does not include a reference to age, INA 351(b) (8 U.S.C. 1483(b)) provides that "a national who within six

months after attaining the age of eighteen years asserts his claim to U.S. nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have lost United States nationality by the commission, prior to his eighteenth birthday, of any of the acts specified in paragraphs (3) and (5) of Section 349(a) of this title." If a case comes to a consular officer's attention of a U.S. citizen "child soldier" serving in the armed forces of a foreign state engaged in hostilities against the United States, the post should immediately bring the matter to the attention of the Department (see 7 FAM 1240).

f. Recruiting or hiring someone to serve in a foreign military service may constitute a violation of federal criminal law (18 U.S.C. 958 - 18 U.S.C. 960).

7 FAM 1272 HISTORICAL BACKGROUND

(CT:CON-285; 03-06-2009)

a. The founding fathers did not regard service to a foreign military to be expatriating.

NOTE: On April 25, 1788, Russia's Empress Catherine II appointed American citizen John Paul Jones to the rank of a Russian Navy rear admiral. Jones retained his U.S. citizenship.

Thomas Jefferson's letter of May 2, 1788, to George Washington regarding the appointment states:

"The war between the Russians and Turks has made an opening for our Commodore Paul Jones. The Empress has invited him into her services. She ensures to him the rank of rear-admiral, will give him a separate command and it is understood that he is never to be commanded. She means to oppose him to the Captain Pacha on the Black Sea. He is by this time probably at St. Petersburg. The circumstances did not permit his awaiting the permission of Congress, but he has made it a condition that he shall be free at all times to return to the orders of Congress whenever they shall please to call for him. And also that he shall not in any case be expected to bear arms against France."

On June 1, 1792, Jones was appointed U.S. Consul "to treat with the Bey of Algiers for the release of American captives." Before he was able to take up this position, he died in Paris July 18, 1792, of pneumonia.

Source: Thomas Jefferson to George Washington, May 2, 1788, George Washington Papers at Library of Congress, 1741-1799, Series 4, General Correspondence 1697-1799; Image 790-795; text of

reference to John Paul Jones appears at images 792-793. This is available on the CAWeb Intranet American and the Barbary Pirates – America's First Hostages feature.

b. The American Civil War amnesty, pardon and restoration of citizenship: On May 29, 1865, President Andrew Johnson issued a Proclamation of Amnesty and Pardon to persons who had participated in the rebellion against the United States. There were fourteen excepted classes, though, and members of those classes had to make special application to the President. Persons excluded from the provisions of amnesty and pardon contained in the proclamation were required to execute an amnesty oath of allegiance to the Union. Robert E. Lee executed the oath before a Virginia notary public. The notarized oath of allegiance was forwarded to William H. Seward, Secretary of State but was never forwarded to President Johnson for approval. In 1970, the oath taken by Robert E. Lee was found in old State Department files stored in the National Archives. In 1975, President Gerald R. Ford signed a bill restoring rights of citizenship to Robert E. Lee posthumously.

See …

National Archives Robert E. Lee's Parole and Citizenship

President Gerald R. Ford's Remarks Upon Signing a Bill Restoring Rights of Citizenship to General Robert E. Lee, August 5, 1975

c. The Act of 1907 did not provide that service in a foreign military was an expatriating act. Therefore, U.S. citizens who fought in behalf of the allied powers in World War I before the United States entered the war, did not lose U.S. citizenship due to foreign military service, but rather due to taking an oath of allegiance to a foreign state. Those for whom a finding of loss of nationality was made, had their citizenship restored.

See …

1918 General Consular Instruction 268

d. Loss of nationality under section 401(c) of the Nationality Act of 1940 (NA) was limited to United States nationals who were also nationals of the foreign country in whose armed forces they served:

(1) Loss of nationality under this statute could not take place while the person was within the United States or any of its outlying possessions (Section 403(a) NA), and no person under 18 years of age was subject to expatriation under its provisions (Section 402(b) NA);

(2) Military service in a foreign state beginning prior to January 13, 1941 (the effective date of the NA), and continuing thereafter did

not result in expatriation unless the person concerned could have terminated his service;

(3) If the conditions for his release were so costly as to render it prohibitive, it was held that the person could not voluntarily secure his release from further service;

(4) It was held that service in the armed forces of an unrecognized state could cause loss of United States nationality under Section 401(c) NA. This holding was based on the precise language of section 401(c), which was not understood to require that the foreign state or its government be recognized by the United States;

(5) Service in the armed forces of a foreign state, to result in loss of nationality, must have been voluntarily performed. The fact that a person was conscripted into service did not necessarily result in the conclusion that the act was performed involuntarily.

7 FAM 1273 EXPATRIATING ACT

(CT:CON-285; 03-06-2009)

A U.S. citizen/noncitizen national who committed or commits one of the following acts during the time period indicated below voluntarily and with the intent to lose U.S. nationality will be found by the Department to have lost U.S. nationality:

Relevant statute	**Applicable dates (relevant date is date the potentially expatriating act was committed)**	**Potentially expatriating act**
Section 401(c) of the Nationality Act of 1940 (repealed)	On or after January 13, 1941, but prior to December 23, 1952	Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.
8 U.S.C. 1481(a)(3) (INA 349(a)(3), as originally enacted	On or after December 23, 1952, but prior to November 14, 1986	Entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: Provided,

		That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday.
8 U.S.C. 1481(a)(3) (INA 349(a)(3)), as amended	On or after November 14, 1986.	Entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States; or (B) such persons serve as a commissioned or noncommissioned officer. This amendment of the statute in 1986 eliminated the provision allowing for approval of the foreign military service by the Secretaries of State and Defense Immigration and Nationality Act Amendments of 1986, Public Law 99-653, § 18(d), 100 Statutes at Large 3658 (amending INA 349(a)(3), 8 U.S.C. § 1481(a)(3)).

7 FAM 1274 SERVICE IN THE ARMED FORCES OF A FOREIGN STATE ENGAGED IN HOSTILITIES AGAINST THE UNITED STATES

(CT:CON-407; 06-29-2012)

a. The Department of State holds that voluntary service in the armed forces of a foreign state engaged in hostilities against the United States is strong evidence of intent to relinquish U.S. citizenship. In Vance v. Terrazas, the U.S. Supreme Court recognized that intent can be expressed "in words or found as a fair inference from conduct."

b. When such a case comes to your attention, you should notify the Department (CA/OCS/ACS) by e-mail alert, followed immediately by a formal cable report. CA/OCS/ACS and *CA/OCS/L* will review the matter carefully, in consultation with the Office of the Legal Adviser. Thereafter,

the Department will provide further guidance to post regarding development of the case if deemed necessary.

c. The cable should include the following information about the individual:

(1) Name;

(2) Date of birth;

(3) Place of birth;

(4) How U.S. citizenship was acquired (birth in the United States, derivative claim through birth abroad; naturalization);

(5) Does the person have the nationality of the foreign state?

(6) If so, how and when did the person acquire foreign nationality?

(7) Position in foreign armed forces;

(8) Brief description of duties;

(9) Any statements by the individual regarding intent to retain or relinquish U.S. citizenship;

(10) Contacts or ties to the United States: Did the person have physical presence or ever reside in the United States? Was the person aware of a claim to U.S. citizenship?

d. The consular section of the U.S. embassy or consulate should inform the legal attaché, the regional security officer and the defense attaché of the case and include consular (CPAS), judicial (KJUS, KCRM) and security and political/military tags (ASEC), (PINR), (PTER) in the reporting cables.

e. It is important to remember that commission of a potentially expatriating act is not in itself sufficient to strip a U.S. citizen of his citizenship. Consistent with the Supreme Court's constitutional rulings in Afroyim v. Rusk, 387 U.S. 253 (1967), and Vance v. Terrazas, 444 U.S. 252 (1980), 8 U.S.C. 1481(a) (INA 349(a)) provides that expatriation can occur only if the person who performed a potentially expatriating act did so voluntarily with the intention of relinquishing U.S. citizenship. A determination that these latter requirements have been met usually is made only after direct contact with the potential expatriate since such contact facilitates ascertaining the person's specific subjective intent. Loss-of-nationality determinations can only be made on a case-by-case basis, because whether an individual has lost U.S. nationality depends on the specific facts of his or her case and in particular on whether he or she voluntarily performed an expatriating act and had the required intent to relinquish nationality.

7 FAM 1275 WHAT CONSTITUTES "ARMED

FORCES" OF A FOREIGN STATE?

(CT:CON-285; 03-06-2009)

a. Armed forces: The question of what constitutes "armed forces" under Section 401(c) NA was addressed in Di Girolamo v. Acheson (1951, DC Dist Col) 101 F. Supp. 380. The son of a naturalized citizen born in the United States was not expatriated by service in Fascist Militia after reaching majority, since Fascist Militia was not part of Italian army. In re Quintanilla-Montes (1970, BIA) 13 I & N Dec 508, "Sunday marching" and drill for about one hour in Mexico under direction of soldier from regular Mexican Army, over period of approximately one year, during which time no rank was held, no firearms were issued nor instructions given in use of weapons, no uniforms, pay nor allowances of any nature were received, and no food, transportation nor medical services were furnished, did not constitute service in armed forces of foreign state under 8 U.S.C. 1481(a)(3) (INA 349(a)(3).

b. Unrecognized foreign state: In United States ex rel. Marks v. Esperdy, 315 F. 2nd 673 (1963), the court held that service in the Cuban rebel forces during the Castro revolution fell into the category of service in the armed forces of a foreign state when the revolution succeeded in overthrowing the Batista Government. A person who serves in the rebel force and continues to serve after the rebels form a new government becomes subject to the provisions of this section. Previous consular guidelines (8 FAM 224.3, Interpretations, TL:CP-31, 4/10/1970) provide that "it was held that service in the armed forces of an unrecognized state could cause loss of U.S. nationality under Section 401(c) NA. This is based on the language of the Act that was understood not to require that the foreign state or its government be recognized by the United States. The holding found support in Hackworth's Digest of International Law, Volume I, which states that "the existence, in fact, of a new state or a new government is not dependent upon its recognition by other states."

c. Paramilitary organizations as opposed to nation states: In 2004, the Department received inquiries about the possible applicability of INA 349(a)(3) (8 U.S.C. 1481(a)(3)) to U.S. citizens who may have served in paramilitary-terrorist organizations, engaged in hostilities against the United States. The statute appears to have in mind the traditional concept of war between nation states, and not the type of unconventional war envisioned in those inquiries. The Department of State only makes determinations of loss of nationality under certain circumstances. Loss of U.S. nationality may be adjudicated in a number of fora (e.g., in removal proceedings or judicial proceedings in which nationality is a critical fact), depending on who is seeking to establish loss of nationality and whether the individual who may have lost nationality is in the United States and its outlying possessions or in a foreign state.

d. INA 358 (8 U.S.C. 1501) provides for adjudication of loss of nationality by the Department of State when there is "reason to believe" that an individual who is in a foreign country has lost nationality while in a foreign country. The consular officer's responsibility under Section 358 extends to persons who are within his or her consular district, because consular officers generally only have jurisdiction to take action with respect to persons in their consular districts. See the Vienna Convention on Consular Relations, 21 U.S.T. 77 (entered into force for the United States December 24, 1969), Articles 5 and 6. Moreover, as a practical matter, the consular officer must have personal contact with the individual to formulate a judgment whether the individual had the required subjective intent to relinquish U.S. nationality.

7 FAM 1276 RESERVE DUTY

(CT:CON-285; 03-06-2009)

Only active duty service in a regular or reserve component is potentially expatriating under INA 349(a)(3). If the foreign law requires a reservist to perform periodic training or military duty, that service constitutes active duty service.

7 FAM 1277 DURESS AND CONSCRIPTION

(CT:CON-285; 03-06-2009)

a. The question of duress resulting in foreign military service caused a great deal of judicial activity during the late 1940's and the 1950's. The cases primarily involved foreign military service by dual nationals in derogation of Section 401(c) of the Nationality Act of 1940.

b. There appears to have been some initial debate on whether duress could be used as a defense by dual nationals to expatriation under this section of law. All of the cases reviewed arose from conscription in the foreign armed forces, as opposed to voluntary enlistment. Aside from the question of the burden of proof in these actions, which was decided in the military service case of Nishikawa v. Dulles, 356 U.S. 129 (1958), the courts' primary concern was, therefore, with the questions of whether protest of the conscription by the citizen was necessary and whether conscription per se could be considered duress.

c. The question of whether formal protest of the induction or conscription would be considered necessary to raise the defense of duress was specifically dealt with in the case of Tomasicchio v. Acheson, 98 F. Supp. 166 (D.C. 1951). The U.S. District Court for the District of Columbia concluded that a protest against being drafted into the Italian army would

have been futile and a refusal to take the oath would have been equally ineffective. Moreover, if the plaintiff took an oath of allegiance upon being drafted into the Italian Army, he was then a minor and consequently, the taking of the oath did not operate as an expatriation. Other decisions by the courts of the period reached similar conclusions. See Scardino v. Acheson, 113 F. Supp. 754 (N.J. 1953); Yoshiro Shibata v. Acheson (1949, DC Cal) 86 F Supp 1; Serizawa v. Dulles (1955, DC Cal) 134 F Supp 713; Acheson v. Maenza (1953) 92 US App DC 85, 202 F2d 453; Perri v. Dulles (1953, CA3 NJ) 206 F2d 586; Kondo v. Acheson (1951, DC Cal) 98 F Supp 884; Hamamoto v. Acheson (1951, DC Cal) 98 F Supp 904; Federici v. Clark (1951, DC Pa) 99 F Supp 1019; Shigenori Morizumi v. Acheson (1951, DC Cal) 101 F Supp 976; Yoshida v. Dulles (1953, DC Hawaii) 116 F Supp 618; Riccio v. Dulles (1953, DC Dist Col) 116 F Supp 680; Gensheimer v. Dulles (1954, DC NJ) 117 F Supp 836; Hiroshi Okada v. Dulles (1955, DC Cal) 134 F Supp 183; Namba v. Dulles (1955, DC Cal) 134 F Supp 633; Moldoveanu v. Dulles (1958, DC Mich) 168 F Supp 1.

d. There was also the question of whether a protest to induction must have been made to United States officials, as opposed to the foreign authorities. In Pandolfo v. Acheson, 202 F. 2d 38, the court held that a United States-Italian dual national was not expatriated by his induction into the Italian army despite the U.S. Government's argument that he should have protested to United States officials.

e. The second major problem, that of conscription alone as proof of duress, has never been completely resolved by the courts. The Courts of Appeal were divided on the question. The Department's position is that conscription will be considered as a factor highly relevant to possible duress, but must be weighed with all the other evidence in the specific case to determine whether duress was in fact present.

f. The Department advised posts that the Department does not consider a person who was conscripted (as opposed to one who enlisted in the military) must be held as a matter of law to have served involuntarily. One can enter the military by means of conscription but nonetheless have been willing, even eager to serve in the military. On the other hand, one who has been conscripted is in a far better position to assert that such service was involuntary.

g. With regard to intent, proven conduct of a person who served in the armed forces of a foreign state at war with the United States is reviewed carefully by the Department when considering the issue of intent. Promotion records and the nature of duties performed are given careful consideration. In addition to the questionnaire, written statements by individuals providing greater detail about the events surrounding the potentially expatriating acts are useful. Historical context from posts is

also helpful.

7 FAM 1278 AUTHORIZATION OF THE SECRETARY OF STATE AND SECRETARY OF DEFENSE TO ENTER OR SERVE

(CT:CON-285; 03-06-2009)

a. INA 349(a)(3), as originally enacted (effective December 23, 1952 – November 13, 1986) and Section 401(c) NA make reference to specific written authorization to serve in the armed forces of a foreign state. In practice, it appears that authorization of the Secretary of State or the Secretary of Defense for service of a U.S. citizen in a foreign military has never been granted.

b. Earlier consular guidelines (8 FAM 225.3, paragraph a (TL:CP-37; 6-20-72) provided that such authorization would not be granted unless such entry or service "is found to be in the national interests of the United States. This authorization will normally be granted only when the United States is at war or during the existence of a national emergency proclaimed by the President." Subsequent consular guidelines (7 FAM 1263, TL:CON-5) provided "Specific written authorization to serve in the armed forces of a foreign state … will not be granted by the Secretary of State unless the service is found to be in the national interest of the United States. Service while the United States is at peace is considered not to be in the national interest because it could create difficulties in our friendly foreign relations with third countries. Authorization to serve will be granted only for service with friendly nations when the United States is at war or during a national emergency proclaimed by the President. In practice, it appears never to have been granted."

c. Authorization by local draft board does not amount to consent by Secretary of State or Secretary of Defense to enter or serve in armed forces of foreign state under 8 U.S.C. 1481(3) (INA 349(a)(3)) so as to prevent loss of nationality. See In re D---- (1954, BIA) 5 I & N Dec 674.

d. A 1994 statute (codified at 10 U.S.C. 1060) provides that a retired member of the U.S. armed services may accept employment with, or hold an office or position in, the military forces of a newly democratic nation if the Secretary of Defense or the relevant branch of the armed services and the Secretary of State jointly approve the employment or the holding of such office or position. (See 22 CFR Part 3a.) Within the Department of State, questions about this subject are handled by the Bureau of Political-Military Affairs (PM) and the Office of the Assistant Legal Adviser for Political and Military Affairs (L/PM).

7 FAM 1279 DESERTION FROM THE U.S. MILITARY OR AVOIDANCE OF U.S. MILITARY SERVICE [REPEALED]

(CT:CON-285; 03-06-2009)

a. 8 U.S.C. 1481(a)(8) provided for loss of nationality for deserting the armed forces of the United States at time of war, if and when convicted thereof by court martial and dishonorably discharged. This was declared unconstitutional by the U.S. Supreme Court in Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). The statute was repealed in 1978 in the Immigration and Nationality Act Amendments of 1986, Public Law No. 99-653, § 18(a), 100 Statutes at Large 3658.

b. INA 349(a)(10) (8 U.S.C. 1481(a)(10)) provided for loss of nationality for departing from or remaining outside of the United States in time of war or period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the armed forces of the United States. An 1865 statute providing for loss of citizenship by draft evaders was repealed in 1940 Legislation, enacted in 1944 and codified in the Act of 1952, prescribed loss of nationality for departing from or remaining outside the United States during time of war or declared national emergency in order to evade or avoid service in the armed forces of the United States

c. These statutory provisions were declared unconstitutional by the Supreme Court (Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S. Ct. 554, 92 L. Ed. 644 (1963) and were repealed by Congress in 1976, Footnote 297, National Emergencies Act of 1976, Public Law No. 94-412, § 501(a), 90 Statutes at Large 1255, 1258. See Senate Report No. 1168, 94th Congress, 2d Sess. 32 (1976), reprinted in 1976 U.S.C.C.A.N. 2288; H.R. Rep. No. 238, 94th Cong., 2d Sess. 15 (1975).

NOTE: On January 21, 1977, President Jimmy Cater granted a Presidential Pardon to those who had avoided the draft during the Vietnam war by either not registering or traveling abroad. See Proclamation 4483 - Presidential Proclamation of Pardon January 21, 1977